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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 732

ANDREW B. CRICHTON, R. M. CRICHTON, C. N. CRICHTON, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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The appellants oppose the motion to affirm the decree of e District Court.

Preliminary Statement

Shortly before his death the Honorable Joseph B. Eastan, speaking before the Association of Interstate Commerce Commission Practitioners, summarized his wide ex-

perience in the field of administration of laws governing common carriers. He then said in part:

> "The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it."

It is the contention of the appellants that in this instance the Statutory District Court committed this error. We fear that the disposition of this cause on motion to affirm will deprive this Court of the advantage of mature presentation of a particularly acute instance of arbitrary and capricious conduct on the part of the Interstate Commerce Commission. The final order of the entire Commission issued herein reversed the informed action of its Division specially charged with the initial appellate consideration of the question and reversed the action of its own Examiner in the same matter. In the process it reversed a Joint Board which on June 2, 1938, *more than five years previously,* had recommended denial of operating rights to the predecessor in interest of Southeastern Motor Lines, Inc., which in the same year initially filed the present application.

There was no additional evidence of any kind which would warrant reversal by the Commission of its Division, except the substitution by its Division of Associated Transport, Inc., while action was pending on motion for reconsideration for the original applicant. We believe we can convince the Court, if permitted to do so, that the Commission became confused in the turmoil of matters of an entirely different character originated by Associated, and that its action in the present cause ignores the record and errs materially as a matter of law, as well as of fact, because of

this confusion. It is the position of the appellants that the District Court in furtherance of an acknowledged and developing judicial tendency to avoid interference with established administrative agencies failed in this instance to recognize the exceptional case where important matters of statutory obligation and legal precedent had been considered incorrectly by the Commission or had not been considered at all.

The certificate which the appellants consider invalid is in force. Associated is operating. The only reason that the appellants have incurred the heavy expense of prosecuting this appeal is a desire to present to this Court in full three substantial errors of law dependent for determination upon a full analysis of a complicated record involving contradictory evidence which cannot be considered adequately on motion.

The Jurisdictional Error

When on June 2, 1938, a Joint Board, appointed by the Interstate Commerce Commission, after hearing, recommended denial of operating rights under the "grandfather" clause, Section 206 (a) of the Interstate Commerce Act, counsel for a predecessor of Associated Transport, Inc., immediately filed two applications under Section 207(a) purporting to seek the same rights to operate from Nashville, Tennessee to New York City as were claimed under "grandfather" rights on behalf of the original applicant. Nevertheless, the applicant prosecuted appeals from the recommendation of the Joint Board on the "grandfather" matter until its final denial on December 30, 1942, by Division 5 of the Interstate Commerce Commission. The entire Commission, on November 2, 1943, permitted the adverse decision in the "grandfather" case to stand. At the latter date, the entire Commission reversed Division 5 (four Commissioners dissenting) as to the convenience and

necessity case but granted authority to operate only between Nashville and Knoxville because Southeastern, which had been the applicant until the substitution of Associated, already possessed operating rights between Knoxville and New York. As shown at page four of the appellee's motion to dismiss, the Commission was well aware of the fact that Southeastern possessed such rights because on December 2, 1937, in a finance order authorizing the acquisition by a predecessor of Southeastern of the original claimed "grandfather" rights herein, the Commission had restricted the purchase to the route between Nashville and Knoxville for this reason. Since the present application was not filed until July, 1938, the then applicant was fully aware that it possessed operating rights from Knoxville to New York and that the Commission could not and would not issue duplicating rights to the same party over this portion of the route. It follows that its request in July, 1938, for a new route from Nashville to New York was not made in good faith and was in that form solely to avoid assignment of the cause as required by Section 205(a) to a joint board representing the single State of Tennessee in which the entire route, which it wanted and could receive, was located.

It is true that a comprehensive examination of the record is required to verify the asserted facts disclosing the fraudulent nature of the multi-state application. In their motion, the appellees conceded that the Commission referred the "new service" applications under Section 207(a) to an examiner rather than to a properly appointed joint board as required by Section 205(a). They further conceded that immediately upon the convening of the hearing the present appellees disputed the jurisdiction of the Examiner and the record will disclose that the Examiner insisted on continuing with the hearing, notwithstanding his own doubts as to his jurisdiction to proceed. It is to be

noted that the "grandfather" application, as originally filed, involved more than three states and it had been reopened for rehearing. Furthermore, when the "grandfather" application was reassigned for further hearing, the Commission, as is its practice, had vacated a compliance order issued December 2, 1937, restricting the original "grandfather" rights to operations between Nashville and Knoxville. This had been entered as a result of the attempted abandonment by Hoover, another predecessor of the Knoxville to New York operation (See jurisdictional statement page 8). However, the reason for the vacation of the compliance order certifying "grandfather" rights between Nashville and Knoxville was the contention of the present appellees, as protestants, that by abandoning the through Nashville-New York service and using Nashville-Knoxville as an extention to other operations the then applicant had abandoned any possible "grandfather" rights, a contention ultimately supported by the Commission.

The facts in this case, when prior orders and the entire record are considered, differ substantially from *North Coast Transportation Company* v. *United States,* D. C. N. D., Cal., in that the cited case involved a *bona fide* application calling for one type of joint board with subsequent modification at the hearing to a route required to be submitted to another type of joint board whereas in the present case the application of July 16, 1938, was filed only because of the applicant's loss of alleged "grandfather" rights which were maintained under appeal for more than four years additional and only as an evasion of the specific statutory requirement of Section 205(a). That section provides that "the Commission shall, • • • " not that the Commission may refer such an application as an extension between Knoxville and Nashville within Tennessee to a joint board composed solely of one member from that state. There is

no ambiguity and if there were reference to the Legislative History, 79th Congressional Record, 74th Congress, page 5653, will show that the Chairman of the Senate Committee, in discussing the provision before the Senate, emphasized the intension of Congress *and of the Interstate Commerce Commission* to submit such matters to "board composed of the representatives of the states wholly or chiefly concerned." It is respectfully submitted that the mere fact that ultimate determination in the event of submission to either an examiner or a joint board rests with the entire Commission is not sufficient reason for disregarding this jurisdictional Congressional mandate as to the original hearing. The appellants have never waived this jurisdictional question. The fact that this Court will ultimately consider a question arising on special appeal through a Statutory District Court or on certiorari through the Circuit Courts does not induce it to disregard original jurisdiction. The entire matter should be remanded for reconsideration and rehearing, particularly in view of the obviously inadequate consideration on the merits and disregard of due process.

Illegal Operations As Evidence

The report of the Commission on reconsideration decided November 2, 1943, from which appeal to the District Court was had, embraced decision denying the "grandfather" application and also reversing its prior report in 41 MCC 671, and granting Associated Transport, Inc., the right to operate as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with exceptions, between Nashville and Knoxville, Tennessee, over regular routes.

It should be borne in mind that reconsideration of the action of Division 5 as to the new service application was granted because "with respect to its extension applications,

applicant contends that the Division erred in not considering evidence of past operations" (Sheet 2). In its final consideration of the entire record the Commission did consider the evidence of past unlawful operations as proof of future requirement of the applicant's service. The District Court states "The Commission had held, in persuasive opinion, that, where past operations have been conducted under color of 'grandfather' rights openly and without subterfuge, *as was surely the case here,* they are competent evidence on the issue of public convenience and necessity." (Emphasis supplied.) Careful examination of the record will disclose (1) that the services reinaugurated by Southeastern, the applicant, predecessor of Associated, after abandonment of the "grandfather" services included service to both Nashville and Knoxville, and interchange with other motor carriers at those points; (2) that it included the carriage of general commodities between Nashville and New York and certain other eastern points; (3) that the "wide variety of commodities, transported since July 1937" (Sheet 4, Commission Report) were entirely dissimilar to the single commodity, enameled table tops and similar products, transported only from Nashville to Brooklyn, New York, in the initial "grandfather" period, and the "fish and oysters" from Norfolk, Virginia, to Nashville (Iden. Sheet 2) constituted the only transportation claimed under the "grandfather" case.

When it filed its new service application on July 16, 1938, seventeen days after the recommended denial of its "grandfather" application, the predecessor of the applicant well knew that the only "grandfather" rights it could prove were for through transportation from Nashville to New York without return cargo, and that the exclusive commodity was enameled table tops and pertinent freight. It follows that the expanded service established after 1938 by reason of the subsequent affiliation with large system

carriers of Associated Transport, Inc., was not conducted under color of "grandfather" rights. In fact, the record shows that the applicants repeatedly protested as illegal the scope of the operations of Southeastern as being initiated without color of "grandfather" rights and upon filing years after "grandfather" date of general service tariffs, but the Commission, too busy to enforce compliance, relied upon the ultimate solution of the problem in the "grandfather" decision, and permitted the obviously illegal transportation to continue, exactly as in an earlier finance or acquisition case involving these rights it had deferred consideration of the splitting of a claimed "grandfather" right with destinations Nashville and New York only so as to permit the sale for $250 of operating rights between Nashville and Knoxville, although such rights had never been claimed by the "grandfather" applicant, Jacobs, and such operation was denied as illegal by the Tennessee Railroad and Public Utilities Commission. (See Hoover Lines, Inc.,—Purchase—Blair Jacobs, MC-F-55, 5 MCC 97, 98.) In that case, also the Commission required Hoover Lines, Associated's predecessor, to purchase only such "grandfather" rights as existed between Nashville and Knoxville. (Page 100.) In the present case it denied that any such "grandfather" rights had ever existed. It follows that all of the service rendered prior to the issuance of the certificate to Associated in the present case covering only new service was illegal, and none of it even purported to be within the known limitation of movement of table tops through from Nashville to New York by the original claimants of "grandfather" rights.

That being the case, the only evidence before the Commission of requirement of public convenience and necessity on the new service application involved herein was evidence of operations which were not only illegal as conducted in

violation of state law, but were also illegal under the Interstate Commerce Act by finding of the Commission itself. There was *no* other evidence of the requirement for the service and the District Court considered only the evidence of the illegal operations.

Verification of this allegation of the appellants requires mature consideration of the entire record, and cannot be determined upon the limited jurisdictional statement or even upon the averments of the motion to affirm. Section 206 (a) does provide that "pending the determination of such application, the continuance of such operation shall be lawful," but this is applicable only to the continuance of the service in which the predecessor "grandfather" applicant purported to be engaged.

It certainly is not contended by the Commission or by the government that an applicant can run into entirely new territory, or that he can materially change the nature of the business conducted, or that he can operate with rebates or discriminatory or unlawful rates, or while engaged in unlawful common control, merely because some form of application for "grandfather" rights had been filed. Any carrier engaged in competition can acquire substantial business, even to the destruction of existing carriers, if it can engage in unlawful practices and it is absurd to suggest that by so doing the carrier or a successor by purchase has proved that its services are required for the public convenience and necessity. The appellants are prepared to analyze not only the contradictory Commission decisions relied upon by the District Court, but all others related to the consideration of past services, in considering convenience and necessity upon the submission of this cause for consideration by the Court.

The action of the Commission complained of by appellants was the grant of a certificate of public convenience and necessity under section 207 (a) of the act which sec-

tion applied exclusively to new service operations. In *D. A. Beard Truck Lines Company, Common Carrier Application—New Operation*, 34 M. C. C. 395, 397, 416, and *Fisher, Common Carrier Application—New Operation*, 42 M. C. C. 695, 696-697, cited by appellees, the Commission held that certain carriers which instituted service prior to June 1, 1935, but were unable to prove the good faith of their operations in view of their having defied State laws should not be regarded as new operators. The doctrine itself is dubious and in any event is not applicable to the present case where the service rendered was without color of "grandfather" rights in Interstate Commerce as well as illegal within the purview of the state commission.

III

In connection with action on motor carrier convenience and necessity applications under Section 207(a) of Part II of the Interstate Commerce Act, the Commission has a statutory obligation to find that "• • • the applicant is fit, willing, and able properly to perform *the service proposed* • • •" (Emphasis supplied). Associated Transport, Inc., did not become a party to the present proceedings until after the close of the hearings and record, the issuance of the Examiner's Report denying the application, and the approval of that report by Division 5 of the Interstate Commerce Commission. There was no evidence relating to Associated Transport, Inc., before the Commission when it decided in the order complained of herein "that Associated Transport, Inc., is fit, willing, and able properly to perform the described operations;" the Commission did not state that it was relying on its judicial knowledge of the fitness of Associated Transport, Inc., and we deny that it could have done so on the basis of evidence adduced in a wholly dissimilar proceeding which did not involve convenience and necessity. Ex-

amination of the record in this case will disclose that there is not a single reference to Associated Transport, Inc., or to the public interest which might be served by its competitive introduction to the transportation service between Nashville and Knoxville as an extension of the gigantic system which it had assembled over the protest of the Department of Justice and of numerous injured interveners.

The District Court and the Appellees rely upon the fact that the Commission had conducted during 1942 an investigation of Associated Transport, Inc., in connection with control and consolidation proceedings. *Jurisdictional Statement,* p. 12. There are cited in support thereof certain cases upholding the power of Courts to take judicial notice of their own records, p. 13, but an examination of the authorities cited reveal a dissimilar statement of facts in the instances cited. The parties were the same or in similar position and the same issues were involved. The purpose of appearance and the nature of proof were identical. In the present instance the issue is entirely dissimilar by reason of the statutory requirement that there must be proof of public convenience and necessity over the specific route and service involved and the fitness to render such service must be suited to the geographical and traffic requirements in the light of existing competition. In an acquisition case the Commission has repeatedly disclaimed that public convenience and necessity are essential. Financial capacity to acquire the property and the provisions of Section 5 of Part I of the Interstate Commerce Act are pertinent.

Could the Commission grant a certificate under Section 207(a) of Part II to an applicant over an extension of its own route without proof of convenience and necessity as to that extension because it had in another and dissimilar case involving a different route found that the applicant

was fit, willing, and able to perform the service as to the dissimilar route and that the public convenience and necessity required such service? The provisions of Section 207(a) are unambiguous and the public protection requires that the administrative body conform specifically thereto. The Court cites *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 93, as support for its statement that the Commission is an administrative body not limited by as strict rules of evidence as controls the Courts. However, in the same paragraph this Court went on to say "but the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted and defended. In such case the Commission cannot act upon their own information as could jurors in primitive days." The Court might have read further, but for the fact that the brief citing the authority used did not set forth completely the requirement as to evidence needed by this Court. In the *Louisville & Nashville R. Co.* case, this Court further said:

> "• • • but the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. • • • And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended on facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat."

The Appellants therefore assert that upon full presentation of the record, it will be disclosed that the Interstate Commerce Commission, with four of the Commis-

sioners dissenting, reversed its Division and its Trial Examiner, notwithstanding the asserted absence of jurisdiction; notwithstanding the absence of any evidence of the types which it usually requires for proof of convenience and necessity; and solely upon evidence of unlawful operations and, with respect to the present subject, in the complete absence of evidence or an opportunity for protestants to be heard as to the fitness, willingness, and ability of Associated Transport, Inc., properly to perform the described operations. If upon hearing the Appellants sustained the order of the District Court in confirming this action of the Commission and in specifically adopting these invalid findings, there will be no alternative but the vacation of the certificate improperly issued by the Commission.

Conclusion

Appellants are aware of the reluctance of the Supreme Court to consider issues within the statutory discretion of administrative tribunals. In this case, three important errors of law which affect the jurisdiction of the Commission, the possibility of a substantiated finding and the nonexistence of any evidence to support a finding specifically required by the statute as a precedent to issuance of a certificate, have been accorded the same presumption of correctness by the statutory court as has become the rule with respect to the weighing of evidence. The Appellants are of the opinion that disposition of this appeal on motion will encourage the continuation of arbitrary reversal of designated divisions of multi-membered administrative bodies upon conference impressions and with further disregard for evidence painstakingly presented.

It is therefore prayed that the motion to affirm be denied and that the appeal be considered by the Court with

adequate opportunity of presentation upon the full record, brief, and oral argument of the issues presented.

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